be done, such *builder* or contractor is responsible for injuries resulting from the careless and negligent manner in which the work is done.

Evidence was offered by the plaintiff to maintain the issue on his part, and testifying in his own behalf, stated that he kept an ice cream saloon, and made cakes and other articles in that line. His counsel then asked him the following question: "What were the usual profits of your business before the accident occurred?" The court permitted the question to be asked.

The question was properly admitted. It is objected to on the ground that the declaration does not claim damages for losses sustained by the plaintiff in the interruption of his trade and business. In this we do not concur. It charges the defendants not only with injuring the house of the plaintiff, but so injuring it "as to prevent him from carrying on his business for several days. * * * whereby the plaintiff sustained loss and damage, &c." Here is a direct allegation that his business was interrupted by the wrongful acts of the defendants, and a claim for damages on account of same.

Judgment affirmed.

STEWART, J., dissented.

Supreme Judicial Court of New Hampshire.

JEWELL v. GRAND TRUNK RAILWAY.

Common carriers are bound to deliver freight, consigned to them for transportation, at a place suitable and reasonable for the consignee to receive it; and whether any given place answers this requirement is a question for the jury, under proper instructions from the court.

The rule would be the same if their liability as common carriers had ended, and the goods remained in their possession as warehousemen or depositaries.

The liability of a master for the negligence of his servants extends only to such acts or omissions as come within the scope of the servant's employment. Therefore, where the servant of a railway corporation, not having authority from the corporation to employ other servants, engaged one G. to assist him in moving a crate of crockery, and, through the negligence or inefficiency of G., combined with the carelessness of the servant, the crate was overturned, striking the plaintiff, whereby it was claimed he suffered a severe injury—*Held*, That the corporation was not liable for the negligence of G., nor for the fault of their servant in employing G. to assist him, even admitting G. to have been an unsuitable and improper person to engage for that service

If the consignee of goods accepts a delivery at a place or in a manner different from what a common carrier is liable by law to deliver them, the business of re-

moving them becomes from that time his business, and the carrier cannot be held liable for the acts or omissions of those employed to do the work.

When the duty of a common carrier as to the delivery of freight has ended, no custom or practice of his servant in assisting consignees in moving or loading their goods can affect the principal.

CASE, commenced in the lifetime of Levi D. Jewell, who died before the trial, to recover damages for a personal injury to the deceased alleged to have been caused by the carelessness and neglect of Thomas Monneghan, an employee of the defendants, in wheeling out and placing upon the platform of the defendants' freight-house, at Gorham, N. H., a crate of crockery belonging to C. L. Plaisted, of Jefferson. Plea, the general issue.

The plaintiff, who was the widow of the deceased, and was his wife at the time of the injury, was offered as a witness by her counsel. The defendants objected to her testifying on the ground of incompetency, but the court allowed her to testify; to which the defendants excepted. The court was of the opinion (and so stated) that her examination would not (and it did not) lead to any violation of marital confidence.

It appeared that on November 24th 1869, the deceased was in the employ of Mr. Thompson, of the Glen House, who sent him on that day with a four-horse team to the defendants' depot, at Gorham, to obtain some freight. When he arrived at the freight-house, he found the team of Mr. Plaisted backed up to the platform at a point nearly opposite the freight-house door, and two men in Plaisted's employ were there. Said Jewell backed his team up to the platform from four to six feet to the right of Plaisted's team, and, upon his freight being pointed out to him by said Monneghan, he took it and loaded it into his wagon. Plaisted's freight consisted of said crate of crockery, weighing 620 lbs., and several smaller articles, which Monneghan had pointed out to his men (Otis A. Garland and John Nutter) inside the freight-house, and which, with the exception of the crate, they had taken and loaded. Garland requested Monneghan to assist in wheeling the crate to the platform. He did so, using a pair of low warehouse trucks, Monneghan wheeling the trucks and Garland steadying the crate as it moved along. In unloading it from the trucks on to the platform, the crate tipped over, and one corner of it hit Jewell on his right shoulder and injured him. Said Jewell was then standing upon the ground between the platform and the hind end of his

wagon adjusting the tail-board, the space between being just wide enough for him to stand in. The platform was about eight feet wide, and as Jewell stood on the ground it was nearly as high as his shoulders. The bottom of his wagon was about on a level with the platform. The crate was about 4½ feet long, 3 feet wide, and 2 or 2½ feet thick, and was loaded lengthwise upon the trucks, and, in unloading it, it was necessary to set it upon the end. In so doing Garland attempted to hold it, but in consequence of the carelessness of Monneghan in depositing it upon the platform, or of the inefficiency of Garland in holding it, or for both of these reasons, it went over, hitting Jewell as before stated, and leaving about 4 inches of the crate projecting beyond the edge of the platform. Plaisted's freight arrived at Gorham depot the preceding day, and was taken out of the cars and set apart for him, or placed for safe keeping in the defendants' freight-house, about 30 feet from where his wagon stood at the time of the injury, and about 18 feet from the door, and remained there until it was pointed out to his men by Monneghan. It did not appear that any goods or other obstruction was between Plaisted's freight and the place where his wagon stood. Monneghan was employed as porter for the defendants about the station at Gorham, and had been for many years. His duty in regard to freight was to unload it from the cars, put it in some convenient place inside the freight-house, keeping each man's freight by itself, and when called for to point it out to the consignee and deliver it, so far as the defendants were bound in law to deliver it, either at that point or upon the platform outside or elsewhere. Thomas H. Cooper, the defendants' superintendent, testified that it was no part of Monneghan's duty or service for the defendants to deliver freight upon the platform, or to load it for the consignees, but he did not deny that it was Monneghan's duty to do whatever it was incumbent on the defendants to do in the matter of delivering freight at Gorham.

The plaintiff's evidence tended to show that it was the ordinary custom of Monneghan to move heavy articles like this crate of crockery from inside the freight-house to the platform when they were called for, and deliver them there; but the defendants' evidence tended to show that, at the request of the consignees, when not otherwise engaged, he had occasionally assisted in moving such articles. The plaintiff did not claim that the defendants were bound to furnish assistance in loading this crate upon Mr. Plaisted's team.

Upon the question of liability, the defendants' counsel requested the court to instruct the jury,—

1. That if Plaisted's freight was received at the Gorham depot, unloaded, and carefully set aside in the defendants' warehouse, in a place reasonably accessible to the owner when called for, and the same was pointed out to him when called for, the defendants' duty as to making delivery of the same, or of forwarding it further, was at an end; that the defendants were under no legal obligation to deliver it upon the platform outside of their warehouse, or to load it upon the consignee's wagon, and cannot be held liable for Monneghan's acts in wheeling out the crate of crockery to the platform after pointing it out as aforesaid, as this would be no service the defendants had contracted or were bound to do for Plaisted; that in doing this service, Monneghan would not be the servant of the defendants.

2. That in order to hold the defendants liable, the jury must find that Monneghan was their servant, and, in performing the act of wheeling the crate of crockery to the platform, was acting within the scope of his employment as such servant, and that his carelessness as such servant in wheeling or in unloading said crate caused it to tip over and injure the deceased.

3. That the defendants are not liable for any negligence or carelessness of said Garland; that he was not the servant of the defendants, and they are in no respect liable for his acts.

4. That even if the defendants were bound as a matter of law to deliver Plaisted's freight on the platform, still, he or his teamster might, if he chose, receive the delivery of it, inside the freight-house; that the testimony of Garland and Monneghan is competent evidence from which the jury may find that the Plaisted freight was in fact delivered and accepted in the freight-house; and if it was thus delivered and accepted, then the question whether or not the defendants were bound to deliver it on the platform or elsewhere does not arise in the case, and the jury need not consider that matter at all; and in such case Monneghan's act in wheeling out and assisting in unloading the crate would be his own voluntary matter, the defendants not being responsible even if he was careless in doing it.

The court did not give these instructions except in a modified form as indicated in the opinion. The jury were instructed to answer certain questions, which are also sufficiently indicated in the opinion.

The jury found a verdict for the plaintiff, assessing damages at $960, which the defendants moved to set aside; and the questions arising on that motion were reserved.

Burns & Heywood (with whom was *Twitchell*), for the plaintiff, cited Sedgwick on the Measure of Damages 654, note; *Illinois Central R. R.* v. *Barron*, 5 Wall. 90.

Ray & Drew (with whom was *G. A. Bingham*), for the defendants, cited *Moses* v. *B. & M. R. R.*, 32 N. H. 523; *Smith* v. *N. & L. R. R.*, 27 N. H. 86; *Flower* v. *Adam*, 2 Taunt. 314; *Marble* v. *Worcester*, 4 Gray 395–397; *Cook* v. *Charlestown*, 98 Mass. 80; *Tutein* v. *Hurley*, 98 Mass. 211.

SMITH, J.—The defendants' first request for instructions to the jury was properly refused. It assumes, as a matter of law, that the warehouse was a reasonable place to require Plaisted to accept the delivery of his freight. The instructions of the court were, in substance, that the defendants were not bound, as a matter of law, to deliver the crate upon the platform outside the freight-house, neither had they a right, as a matter of law, to deposit it in the freight-house and compel Plaisted to receive it there; but they were bound to deliver the freight in a convenient and suitable place in which it was reasonable for them to compel Plaisted to receive it, which might be inside the freight-house, or upon the platform outside, or elsewhere. It is a question for the jury, under the circumstances of each particular case, to say what, under proper instructions from the court, would be reasonable in this respect, and this irrespective of the question whether the defendants were liable to Plaisted as common carriers or depositaries. I do not think it necessary to inquire whether the defendants, at the time of this accident to Jewell, were liable to Plaisted in the one capacity or the other; for in whichever capacity they were liable they were bound to deliver the goods to Plaisted. This might have been by pointing them out to him in their warehouse, provided that were reasonable; or it might have been by delivering them elsewhere, provided that were reasonable, as the jury might find. The period when the liability of railroads as common carriers ends was very fully discussed in *Moses* v. *Boston & Maine Railroad*, 32 N. H. 523, and their liability as depositaries was also fully discussed in

Smith v. *Nashua & Lowell Railroad*, 27 N. H. 86; and we see no occasion to review the law as laid down in those cases.

The defendants' second and third requests for instructions were substantially granted in the instructions by the presiding justice to the jury; but the qualification, that the defendants would be liable if Monneghan, in the exercise of ordinary care, ought to have selected a fitter person, and ought not to have permitted Garland to assist him, if they should find the accident was owing to the carelessness of Garland, I think was erroneous. The declaration alleges an injury done the plaintiff by the defendants' servant, Monneghan, in carelessly wheeling out and placing on the platform the crate of crockery. There is no allegation that it was done by Garland, or that Garland was a servant of the defendants, or that the defendants, or their servant Monneghan, were guilty of negligence in procuring or permitting Garland to aid in the removal of the crate. And if it had been properly alleged that the defendants' servant, Monneghan, was guilty of negligence in procuring an unsuitable person to assist in the removal, I think the cause would be too remote. The proximate cause of the injury would be Garland's negligence. The allegation would be for a cause that created a cause that did the injury,—that is, that Monneghan's negligence employed Garland, a negligent person, who committed the wrong or injury through negligence. It is not necessary to enlarge upon the rule of very general application in the law, "*In jure, causa proxima, non remota, spectatur*," nor upon the maxim of the schoolmen, "*Causa causantis, causa est causati*," further than to add, in the words of SHAW, C. J., : "The law looks to a practical rule, adapted to the rights and duties of all persons in society, in the common and ordinary concerns of actual and real life; and, on account of the difficulty in unravelling a combination of causes, and of tracing each result, as a matter of fact, to its true, real, and efficient cause, the law has adopted the rule, before stated, of regarding the proximate and not the remote cause of the occurrence which is the subject of inquiry:" *Marble* v. *Worcester*, 4 Gray 395; *Cook* v. *Charlestown*, 98 Mass. 80; *Tutein* v. *Hurley*, Id. 211.

The jury, by their answer to the fourth question, found that the accident was the result of the joint negligence of Monneghan and Garland. But, having failed to agree upon an answer to the fifth question, whether there was any want of ordinary care on the

part of Monneghan in not having a more suitable person than he did to assist him in moving the crate, the defendants claim that a verdict should have been ordered for them, because it does not appear that the negligence of Monneghan alone, in wheeling the crate, was sufficient to cause the accident, and because they are made liable for the negligent act of Garland, or the joint negligence of Garland and Monneghan. It is true that there was no special finding of the jury upon the question of whether Monneghan's negligence was sufficient; and, had a general verdict been ordered by the court, it might have been necessary to set the verdict aside. But the case states that the jury found a verdict for the plaintiff; and I think it must follow that it was found on account of the negligent act of Monneghan, and that his negligence alone was sufficient to cause the injury. The instructions of the court were that they must find, in order to entitle the plaintiff to recover, that Monneghan's carelessness, in wheeling or unloading the crate, caused it to tip over and injure the deceased; and that the defendants were not liable for the neglect or carelessness of Garland, except as before stated.

As the verdict is to be set aside upon another ground, the question is only important in the event of a new trial.

We think the instructions asked by the defendants in their fourth request should have been given.

It was the duty of the defendants to transport the goods, and deliver them to Plaisted from their cars or at their freight-house. But the duty might be modified as to the manner of its performance. The general duty of the defendants as common carriers was, to make a true delivery of the goods at the usual place, which was from their cars or at their depot; but we think it must be entirely clear that it was competent for Plaisted to assent to a delivery elsewhere, and if he accepted the delivery of his goods elsewhere he thereby assumed the further responsibility, and the defendants were exempted from the duty of making any other or different delivery: *Lewis* v. *Western Railroad*, 11 Met. 509. In that case, it is remarked by DEWEY, J.,: "Suppose a bale of goods was transported by them [the defendant railroad], and on its arrival at the depot the owner should step into the car and ask for a delivery there, and thereupon the goods should be passed over to him in the car: the delivery would be perfect; and, if any casualty should subsequently occur in taking out the bale, the loss would be his. The

place and manner of delivery may always be varied with the assent of the owner of the property; and, if he interferes to control or direct in the matter, he assumes the responsibility."

In the case at bar, when Plaisted's team came for his goods, the several packages were pointed out to his servants, Garland and Nutter, by Monneghan, the servant of the defendants, inside the freight-house.

So far as the case finds, no claim was made by them that the place inside where the goods were deposited was not convenient and suitable, or that they were entitled to have the goods delivered to them upon the platform outside; but they took and loaded all the articles except the crate. That they did this, and did not call upon Monneghan to do it, or claim that he should deliver the goods outside upon the platform, was evidence for the jury to find an acceptance of them by Plaisted's servants inside. Garland then *requested* Monneghan to assist in wheeling the crate to the platform. This request was also evidence, from which it was competent for the jury to find a delivery accepted inside. It is true that the jury answered the ninth question, "Did the man to whom Plaisted intrusted the duty of going for his goods undertake to accept the crate inside the depot, or to relieve the defendants from any duty which they were bound to perform in relation to its delivery?" in the negative; but the case also finds that the court "did not instruct the jury that their finding upon the ninth question would be in any way material in the decision of the cause."

I think here was evidence from which the jury might have found a delivery and acceptance of the goods inside the freight-house, and that the defendants' request should have been granted. If the instructions asked for had been given, and if the court had instructed the jury in what respect their finding "would be material in the decision of the cause," their finding upon the ninth question might have been different. However that may be, the defendants were entitled to have the jury properly instructed on this point; and because they were not, the verdict must be set aside.

It necessarily follows, that if there was a delivery and acceptance of the goods inside the depot, Monneghan's act, in wheeling out and assisting in unloading the crate at the request of Plaisted or his servants, would be his own voluntary matter, and the defendants would not be responsible for his negligence.

The jury were also instructed, that "if it was Monneghan's ordinary custom, when heavy freight like this crate of crockery was called for by the consignees after it had been deposited in the freight-house, to remove it to the platform outside, then this would become the service of the defendants, even if their duty had ceased as to the delivery of the goods." We are unable to assent to the law as here laid down. The terms "custom" and "usage" are often used indifferently. "Their true office is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contract, arising not from express stipulation, but from mere implications and presumptions and acts of a doubtful and equivocal character," &c.: 2 Greenl. Ev., sec. 251. Evidence of Monneghan's custom in this respect was admissible, as showing the nature of the defendants' contracts as to the transportation and delivery of freight, and as bearing upon the particular mode and place of delivery of heavy freight, and, as the plaintiff's counsel says in his brief, is evidence of the extent of Monneghan's services. But still it is a question of fact for the jury to say, upon all the evidence and circumstances in the case, including the evidence of custom, what the defendants' contract or undertaking, as to the mode and place of delivery of freight, was. But the instructions went further than this, and the jury were told that the ordinary custom of Monneghan to remove heavy freight from the inside to the platform outside, *even after* the defendants' duty had ceased as to the delivery of the goods, would become the service of the defendants. It is difficult to see how, after the defendants' duty had ceased as to the delivery of freight, any custom or practice of Monneghan's in assisting consignees in moving or loading their goods, can affect the defendants. The defendants are only responsible for their servant's acts when acting within the line of his duty, and within the line of their duty to their consignees. When that duty has ended, they are no more responsible for his acts and doings than for the acts and doings of any other person.

The plaintiff was properly admitted to testify—Gen. Stats., ch. 209, sec. 20—except so far as would lead to the violation of marital confidence—Id. sec. 21; but as no marital confidence was violated, no exception lies to the admission of her testimony.

Verdict set aside and new trial ordered.